

**IN THE UPPER TRIBUNAL  
ADMINISTRATIVE APPEALS CHAMBER**

**Upper Tribunal case No. CE/26/2018**

**Before:** Mr E Mitchell Judge of the Upper Tribunal

**Decision:** The decision of the First-tier Tribunal (21 August 2017, Manchester, file reference SC 944/17/01122) involved an error on a point of law. It is **SET ASIDE** under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 and the Appellant's appeal against the Secretary of State's decision of 18 April 2017 case is **REMITTED** to the First-tier Tribunal for re-determination in accordance with the directions given at the end of the reasons for this decision.

**REASONS FOR DECISION**

**Background**

1. Mr R claimed Employment and Support Allowance (ESA). His claim relied on bilateral carpal tunnel syndrome, which he said surgery had failed to resolve. On 18 April 2017, the Secretary of State rejected Mr R's claim and he appealed to the First-tier Tribunal.

2. The documentary evidence before the First-tier Tribunal included:

- The report of a DWP-commissioned Healthcare Professional (HCP), a registered nurse, written on 4 April 2017, the date on which the HCP examined Mr R. Following examination, the HCP concluded that his left hand grip was weaker than normal but his right hand grip was normal;
- A Consultant Occupational Physician's report dated 30 November 2016, which included the following passage:

“I carried out an appropriate clinical examination [on 28 November 2016] which revealed considerable tenderness over both wrists and the tests for carpal tunnel syndrome were positive in both hands. Grip was very poor, again, in both left and right wrist”.

3. Neither party requested a hearing and the First-tier Tribunal determined Mr R's appeal on the papers. The tribunal agreed with the Secretary of State that Mr R scored zero points in the Work Capability Assessment (WCA) used to determine whether a person has limited capability for work, which is one of the ESA "basic conditions" (section 1 of the Welfare Reform Act 2007).

### **Grounds of appeal**

4. The Upper Tribunal's determination granting Mr R permission to appeal against the First-tier Tribunal's decision read as follows:

#### **"...Why I have granted permission to appeal**

3. Mr [R's] written application argues that the First-tier Tribunal (1) did not look at the medical evidence in enough depth and (2) wrongly dismissed the opinions of the medical profession. Mr [R] also described and provided the results of recent medical investigations. However, the Upper Tribunal's task is to determine whether the First-tier Tribunal's decision involved an error on a point of law. This more recent evidence does not show any error in the Tribunal's approach.

4. As drafted, Mr [R's] application does not describe any error of law. Since he is not professionally represented, I will convert his arguments into the closest error of law argument.

5. I shall take the first argument to be that the Tribunal overlooked relevant medical evidence. This argument does not have a realistic prospect of success. The Tribunal took into account the Occupational Surgeon's opinions about Mr [R's] hand-related disabilities as well as the Occupational Physician's description of his symptoms.

6. I shall take the second argument to be that the Tribunal gave inadequate reasons for its decision. Arguably, the Tribunal's reasons for its findings about Mr R's manual dexterity (probably the central issue on the appeal), and ability to pick and move objects, were inadequate:

(1) The First-tier Tribunal preferred the grip evidence of the [HCP] to that of an Occupational Physician because the HCP's opinion was given closer to the relevant date (the date of the DWP's decision). I struggle to see why this was relevant. The date on which grip was assessed says nothing about the accuracy of the examination at the time it was undertaken. It might be relevant if, say, there was evidence of alteration of symptoms. But, in this case, (a) the

Occupational Physician's opinion was given before the Healthcare Professional's, and (b) Mr [R] gave evidence that his condition had deteriorated. The fact that the HCP's opinion was closer in point of time to the DWP's decision was arguably an inadequate reason for preferring that opinion because it was not combined with a finding that Mr [R] grip had improved between the two examinations;

(2) Work Capability Assessment activity 5 assesses ability to perform specific actions with hands, including picking up a £1 coin or equivalent with either hand and single-handedly using a suitable keyboard or mouse. The law requires a tribunal to consider whether these activities can be performed with reasonable regularity. The Tribunal's statement of reasons makes no express finding as to Mr [R's] ability to pick up a £1 coin, or use a suitable keyboard or mouse, with reasonable regularity;

(3) In the light of Mr [R's] diagnosed hand problem, arguably the requirement to give adequate reasons required the First-tier Tribunal to address whether he had sufficient grip to allow him to pick up and move an object like a cardboard box with reasonable regularity and to do so reliably.

7. I also grant permission to appeal so that the Upper Tribunal may address whether WCA descriptor 5(b) is to be assessed by reference to the old £1 coin or the new version whose bevelled edge may make it easier to handle.”

### **The arguments**

5. The Secretary of State concedes that the First-tier Tribunal's reasons were inadequate as described in paragraphs 6(2) and (3) of the Upper Tribunal permission determination. Her representative submits that the tribunal failed adequately to explain why none of the activity 4 or 5 descriptors applied. As I understand the submission, the representative argues that the tribunal's findings were too general and did not focus on the specific terms of each point-scoring descriptor within activities 4 and 5.

6. The Secretary of State does not agree that the First-tier Tribunal's reasons were inadequate as described in paragraph 6(1) of the permission determination. I have not found the reasons for opposition easy to discern. The issue raised by paragraph 6(1) was whether the First-tier Tribunal erred in law by preferring the HCP's report to an Occupational Physician's report because the HCP report was closer in point of time to the decision under appeal. The representative argues:

- (a) The tribunal did “refer” to the Physician’s report “as well as mostly referring to claimant’s specific employment at the time”. I do not understand the latter point since Mr R was not working at the date of neither the Physician’s report, the HCP’s report nor the Secretary of State’s decision;
- (b) The tribunal gave “a couple of other reasons why [the Physician’s report and Mr R’s own evidence] are of less relevance than the HCP’s report”. These other reasons are not identified in the Secretary of State’s response;
- (c) The tribunal “has mainly focussed on the tasks the claimant is able to perform, which all the evidence agrees with”.

7. For these reasons, “while there is not a particularly detailed explanation for all the reasons why the FtT preferred the HCP’s evidence”, the representative argues “the explanation it has provided leads to a conclusion which some other reasonable tribunals may have also reached”.

8. I am very disappointed that the Secretary of State’s written response ignored the final ground of appeal. Normally, I would require supply of a supplementary submission. However, during these proceedings Mr R has sent the Upper Tribunal a number of letters, in increasingly desperate terms, in which he requests a decision as soon as possible. In addition, Mr R does not take issue with the Secretary of State’s failure to deal with the final ground of appeal. For those reasons, I proceed to make a decision despite the Secretary of State’s inadequate written response.

9. I should point out that my comments about the quality of the Secretary of State’s submission in this case are not indicative of any general concern. In fact, my disappointment arises, in large part, because the Secretary of State’s Decision Making and Appeals Unit’s written submissions in Upper Tribunal proceedings are normally of good quality.

10. The Secretary of State’s representative invites the Upper Tribunal to set aside the First-tier Tribunal’s decision and remit Mr R’s appeal against her PIP decision to that tribunal for re-determination. Mr R did not dispute this invitation in his written reply.

11. Mr R’s written reply to the Secretary of State’s response simply provides an update on his health condition. Both before and after receipt of that reply, Mr R has sent several letters to the Upper Tribunal about his current health status. These have been added to the Upper Tribunal appeal bundle and will also be included within the First-tier Tribunal’s bundle. But,

as the Upper Tribunal's permission determination pointed out, this new evidence does not show an error of law in the First-tier Tribunal's decision.

12. Neither party has requested that the Upper Tribunal holds a hearing before deciding this appeal. A hearing is not necessary.

## **Conclusions**

### *Inadequate reasons*

13. I decide that the First-tier Tribunal's decision involved an error on a point of law. The reasons for its decision were inadequate. I set aside its decision.

14. The tribunal's statement of reasons includes: "in an Occupational Physician report dated 30/11/16 it is recorded that Mr [R] has poor grip but the tribunal preferred the findings in the HCP report as it corresponded more with the time of the decision" and the Physician "was also addressing issues that there might be in relation to Mr R's employment at that time". In the same paragraph, the reasons also refer to an "earlier" Orthopaedic Surgeon's report that Mr R may have difficulty with "the heavier facets of DIY and gardening" and can "dress, toilet and feed himself and drive. The Surgeon's report was dated 30 November 2016 (i.e. it was not earlier than the Physician's report, although it did follow an examination on 1 August 2016). The statement of reasons does not refer to that part of the Surgeon's report which refers to Mr R's ongoing pain and pins and needles, despite bilateral surgery for carpal tunnel syndrome.

15. It is in my judgment clear that the First-tier Tribunal's principal reason for preferring the HCP report was that it was closer in time to the date of the Secretary of State's decision than the Occupational Physician's report.

16. If, in preferring the HCP report to the Physician's, the tribunal also relied on the fact that the Physician was instructed in relation to Mr R's continued employment, it took into account an irrelevant consideration. No reasonable tribunal could conclude that the purpose of the report tended to show that the Physician carried out a less competent grip examination than the HCP.

17. The HCP report was dated a couple of weeks before the Secretary of State's decision, the Occupational Physician's report about four and a half months before. Of itself, this was an inadequate reason for preferring the HCP's report. In my judgement, no reasonable tribunal

could have decided that the Physician's report had become 'stale' so that, in relation to the important issue of grip impairment, the HCP's report was to be preferred. Some other consideration/s had to be identified in order to supply an adequate reason for preferring the HCP's report. It is self-evident that the passage of time does not convert an effective assessment of grip into a flawed assessment. In substance, this must have been the tribunal's reasoning since it did not find that the HCP report was to be preferred because, between the two reports, Mr R's hand and arm function had improved.

18. I am not convinced that the tribunal also relied on the Occupational Surgeon's report in deciding to prefer the HCP report to the Physician's. But, even if it did, this does not render the tribunal's reasons adequate. The key issue was the reliability of the Physician's assessment of Mr R's grip (it was in relation to this topic that the HCP report and the Physician's report intersected). The Surgeon referred to "diminution in grip strength" in both hands. In other words, the Surgeon's assessment findings were also inconsistent with the HCP's findings. The HCP's opinion was that Mr R had impaired grip in only one hand.

19. I also decide that the First-tier Tribunal gave inadequate reasons for its decision as described in paragraphs 6(2) and (3) of the determination granting Mr R permission to appeal. Given the nature of Mr R's diagnosed hand condition, the question whether activities involving wrist strength, grip and finger control could be performed with reasonable regularity was an issue that any reasonable tribunal would have considered raised by his appeal. This issue was not addressed at all.

20. The First-tier Tribunal's decision is set aside.

*The £1 coin issue*

21. The Work Capability Assessment (WCA) is used to determine whether a person has limited capability for work for ESA purposes.

22. The WCA is set out in Schedule 2 to the Employment and Support Allowance Regulations 2008. It comprises a range of activities each of which is associated with 'descriptors'. The descriptors describe various modes of carrying out, or having difficulty in carrying out, the activities. Each descriptor is allotted points and a person needs a total score of at least 15 points to have limited capability for work.

23. WCA activity 5 is Manual Dexterity. Descriptor 5(b), which scores 15 points, is "cannot pick up a £1 coin or equivalent with either hand".

24. Since the Work Capability Assessment was first prescribed, the shape of a £1 coin has changed. Rather than smooth with little ridges, the edge is now bevelled. I fully accept that individuals with the ability to pick up one type of coin but not the other are unlikely to be encountered frequently. But it is conceivable that certain disorders affecting the fingers may result in such a differential ability.

25. In *Royal College of Nursing of the United Kingdom v Department of Health and Social Security* [1981] AC 800, Lord Wilberforce described the matters to be taken into account in considering whether legislation applies to a new state of affairs. This is sometimes referred to as the principle that an Act is ‘always speaking’. His Lordship said:

"In interpreting an Act of Parliament it is proper, and indeed necessary, to have regard to the state of affairs existing, and known by Parliament to be existing, at the time. It is a fair presumption that Parliament's policy or intention is directed to that state of affairs. Leaving aside cases of omission by inadvertence...when a new state of affairs, or a fresh set of facts bearing on policy, comes into existence, the courts have to consider whether they fall within the parliamentary intention. They may be held to do so, if they fall within the same genus of facts as those to which the expressed policy has been formulated. They may also be held to do so if there can be detected a clear purpose in the legislation which can only be fulfilled if the extension is made."

26. In the present case, the legislator is the Secretary of State rather than Parliament but the principles are the same. In my view, the legislator must have intended to refer in activity 5 to the £1 coin in the form in which it exists whenever the assessment is applied in an individual case. The Work Capability Assessment is intended to be a relatively simple set of rules to understand and apply. It would defeat that intention if the old £1 coin continued to be contemplated by those who have to apply and advise on the WCA. This is simply a view rather than a binding interpretation. I do not feel able to rule on the issue because it has not been addressed in argument.

## **Directions**

### **I direct as follows:**

- (1) Mr R's appeal against the Secretary of State's decision of 18 April 2017 is remitted to the First-tier Tribunal for re-determination.
- (2) Mr R's appeal is to be determined by a differently constituted panel.

- (3) If Mr R wants the First-tier Tribunal to hold a hearing before determining his appeal, he must make a written request to be received by that tribunal within **one month** of the date on which this decision is issued.
- (4) If Mr R wishes to rely on any further written evidence or argument it is to be received by the First-tier Tribunal within **one month** of the date on which this decision is issued.

**Directions (3) and (4) may be varied by direction given by the First-tier Tribunal.**

**Mr R is reminded that the law prevents the First-tier Tribunal from taking into account circumstances not applicable at 18 April 2017, when the decision under appeal was taken (section 12, Social Security Act 1998). Evidence generated after that date may be taken into account if it is relevant to the circumstances at 18 April 2017.**

**(Signed on the Original)**

E Mitchell  
**Judge of the Upper Tribunal**  
**20 September 2018**